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Senate

On the ‘Fairness in Asbestos Injury Resolution Act of 2005’

Mr. President, later this afternoon, in fact about 3 1/2 hours, we will gather in the Senate to vote on a motion to proceed to take up and begin debate on legislation that is designed -- imperfect legislation but well intended -- to ensure that people who have been exposed to asbestos who become sick, whose breathing is impaired from that sickness, will have an opportunity to be compensated for their impairment. As their impairment worsens, if it does, they would be in a position to be compensated further. The legislation also is intended to try to ensure that more money that is paid--if you go by defendants and insurance companies--ends up in the pockets of those victims and of their families.

The question is: Why are we taking this up now? One of the reasons we are taking this up now is because the Supreme Court has been saying, at least since 1997, with Justices including, I believe, Justice Ginsburg and maybe more recently Justice Souter, that the issue of asbestos litigation is one that needs to be resolved by Congress, not by the Court. It is appropriate that finally we are taking this on.

My own experience and involvement with asbestos litigation reform goes back to 2001, when I was called upon by an old friend who had ended up becoming a CEO of a company I had never heard of called Federal-Mogul. Federal-Mogul is a company headquartered in Michigan that manufactures, among other things, Champion spark plugs and a lot of other products. He had become CEO in 2001 and was in Washington and told me about it. I congratulated him and said good luck, and said if I can be of service, let me know. He called me back in about 6 months. He said: Remember, you said if I could ever be of assistance to let you know. We have a problem at Federal-Mogul. And he came back to explain what it was all about.

Apparently, Federal-Mogul acquired a number of years before, long before my friend became CEO, a British company that had an exposure to asbestos, and because of that exposure, Federal-Mogul was drawn into asbestos litigation lawsuits by folks whose health had been damaged, I believe, by the British subsidiary that I think was owned and sold by Federal-Mogul in a relatively short period of time.

At the time, I took my friend around to meet with the two Senators from Michigan, Senator Levin and Senator Stabenow. They were good enough to meet with him. I also took him over to meet with the then-chairman of the Senate Judiciary Committee, Patrick Leahy of Vermont, and asked Chairman Leahy to meet with the CEO from Federal-Mogul. He did. The long and short of it is Federal-Mogul went into bankruptcy. They have come out of bankruptcy, but a lot of the shareholders who owned stock in the company lost a good deal. Folks who had been employees, pensioners who had their money in 401(k) plans, lost a fair amount of their money if it was invested in company stock. The company ended up with fewer employees than it had in the first place.

Along about the same time I had another visit, this from a trial lawyer who represented, and I presume still represents, people who have been exposed to asbestos in their work and have developed a fatal disease called mesothelioma. This attorney came to say that the system, as it existed in either 2001 or 2002, was not working, and the folks he represented who were sick and dying, many who die within a year or so, were not receiving the help they and their families needed--at least not promptly. And a good deal of the moneys paid by defendants ended up in the pockets of people such as him, the attorney.

He said people who are sick and dying ought to get the money they need, generously; they should get it now. The folks who have been exposed to asbestos but who are not sick and do not have an impairment should not get anything now

and folks such as I, maybe, should get a little bit less in terms of the moneys paid by defendants to victims.

That was how I was introduced to this issue. I did not come to the Senate to be involved in civil justice reform or particularly asbestos litigation reform, but I did come with a number of core values. I think we all did. Among the core values I brought was to try to figure out what is the right thing to do: Try to treat other people the way I want to be treated, try to use a little bit of common sense.

We have been joined in the Senate by Senator Hatch, who preceded and later succeeded Senator Leahy as chairman of the Judiciary Committee. He has worked, as has Senator Leahy, and as has the current chairman, Senator Specter of the Judiciary Committee, to try to improve the legislation that was introduced years ago, maybe even before I came here in 2001, initially.

What was originally introduced was not a static use of legislation. It was not the Ten Commandments. It was not carved into stone. It was a legislative proposal. Over time, it has been changed and has been improved and, frankly, I believe it can be improved further. I will talk a little bit about some of the improvements that have been made over time to the earlier legislation and some further changes I would like to see made and would expect to support those changes.

Before I do that, let me back up for a moment and say some Members worked on class action reform legislation which was enacted and signed by the President early last year. Again, Senator Hatch was a leader in that effort. I was

involved, to some extent, along with some of my colleagues, including Senators Dodd, Schumer, and Kohl, among others on our side, working with our colleagues on the Republican side.

The history of class action reform goes back to the 1990s. The idea behind class action reform legislation was to try to come up with a legislative approach to make sure, when little people are harmed by big companies or by small companies--harmed not that they lose their arm, leg or eyesight but harmed in a material way--that those little people have the opportunity to be made whole but, at the same time, to make sure, when the class action lawsuit is filed by a group of people that are drawn into a plaintiff class, the defendants have the opportunity to be defended or have their case heard in a courtroom or before a judge so the defendant, as well as the plaintiff, can be given a fair shake.

That legislation was introduced in the 1990s, reintroduced in subsequent Congresses, debated in committee, voted on in committee, and reported out of committee. Class action literally came to the floor, I think, on at least two occasions where we were unable to get the votes for cloture to end debate and to go on to final debate and passage with an up-or-down vote on the bill.

That process, though, where legislation is introduced, maybe over several Congresses, is debated within the appropriate committees, voted on in those committees, amended in those committees, reported out to the Senate, and debated here, amended here, I call that regular order. That is what we call regular order.

When the final compromise was agreed to on class action, including the bipartisan group I alluded to a few minutes ago, we struck an agreement amongst ourselves, an agreement with the House of Representatives that if we would not amend or change that compromise that we struck on class action, the House would accept our proposal, the House would not change one word. As a result, we, the drafters, if you will, of the final compromise on class action reform opposed, for the most part, all amendments. I think I supported one offered by Senator Feingold. But no amendments were approved. No amendments were attached to the bill. The bill passed with a bipartisan majority and was sent to the House of Representatives. They adopted it lock, stock, and barrel.

What I want to see happen on asbestos litigation legislation is that we proceed with regular order. In fact, we have been proceeding with regular order. But there is a difference between asbestos litigation on the floor and class action on this Senate floor a year or so ago. Here is the difference: There is no agreement amongst the bipartisan group that I talked about earlier to pass an unamended bill. As I said a few moments ago, this is not a perfect bill, it is an imperfect bill, but it is a whole lot better than it was when it started out. In my view, it can be made better still.

I would like to see us soon--we vote today at 6 o'clock on the motion to proceed to the bill. My hope is Democrats and Republicans, a majority of us, 60 or more, will vote to proceed to the bill, to debate the bill, offer amendments, debate those amendments, vote on those amendments, and then to

see how the bill takes shape during the course of the debate in the week or so ahead.

Let me mention, briefly, some of the improvements that have been made in the bill over what was introduced maybe back in the late 1990s or the earlier part of this decade.

First of all, serious questions were raised, and are still raised, about the size of the trust fund that will be created. Moneys paid into it by defendant companies, roughly \$90 billion; by insurers, about \$46 billion; by trust funds and others, \$4 billion--adding up to, roughly, about \$140 billion. That is almost 50 percent more in the trust fund than I think was originally anticipated just a few years ago. So I would suggest one of the improvements that has been made in this bill is just the adequacy of the trust fund.

There is a second thing that I would suggest has been an improvement made in this bill over maybe an earlier version. Now, \$140 billion is a lot of money, but there is a history of the trust funds set up to help asbestos victims, there is a history of them, in some cases, running out of money. So what happens if we have a trust fund that is set up where everybody who, in the future, wants to file a claim has to go to the trust fund for an administrative solution and the fund runs out of money? What do we do then?

What we do then is really take the path suggested by Senator Dianne Feinstein of California. In anticipation of just that kind of problem down the road, she offered language, which was adopted and made part of this bill, which says if the trust fund runs out of money at some

point down the line and it does not look as if we are going to have enough money in the trust fund any time soon to pay victims' claims, then those victims can return to the tort system. They can go back into court in the State in which they live. They can go back into court in the State where they were injured. Or they can go back into the tort system in Federal courts.

Another area where I think improvement has been made deals with folks who have been injured, where they have been receiving workers' compensation, and now they will, in the coming months or years--if we establish this fund--have the opportunity to file a claim with the asbestos trust fund. The question was: Well, can a person receive money out of the trust fund and also have received previously workers' comp or currently receive workers' compensation funds? Or do they have to pay that back somehow out of the money they receive from the trust fund?

I think the authors of the bill, wisely, and the committee, wisely, said no. If the person is receiving workers' comp from a separate source of funds, they can keep that. It does not have to be reclaimed or repaid. And the claimant, the victim, can then also receive the moneys from the trust fund that we would set up, establish under this legislation.

If you look at the legislation, a fourth improvement deals with something called medical monitoring. But if you look at the legislation, there are a number of levels of impairment, starting with level I, and I think going up to level IX. And there may be some various gradations within each of those levels.

Level I is something called medical monitoring. It has been a matter of some contention. Some of the companies, some of the defendants, some of the insurance companies were very skittish and reluctant, understandably so, given the history of some of the ways people were recruited to file some, not all but some, asbestos claims in the past. They were concerned the medical monitoring might be an effort to recruit all kinds of people to file claims on the trust fund.

But medical monitoring is included as level I for impairment. And level I means a person has been exposed to asbestos --maybe in their work or another part of their environment--but they do not have an impairment, there is no discernible impairment that we can attribute to asbestos. But by establishing medical monitoring, what we say to those who have been exposed, who do not have an impairment, at least we acknowledge you could have a problem down the road, and we are going to provide, every year or two, for the opportunity for someone--a health professional who really does know their business--to examine that victim and see whether any impairment has developed. If so, they can go through other levels and become eligible for sums of money, from several tens of thousands of dollars to over \$1 million in the worst cases.

A fifth improvement I think has been made deals with what are called exigent claims. Those are claims filed traditionally by people who have mesothelioma, the disease I talked about earlier, caused by asbestos, solely by asbestos exposure. We know mesothelioma victims, folks, are going to die, unfortunately, and not a pleasant

death, and die fairly soon, generally within less than a year.

For exigent claims like that, or other people who are believed by doctors to be in a terminal situation where their lifespan is less than a year, those claims, under this improved version of the bill, will be treated on an expedited basis. I believe that is an improvement.

There are other improvements. I mention one: silica claims. There are mixed death claims that are not just asbestos. They might be silica. A good thing that happened last year during the course of the committee's hearings is they brought in medical experts and actually talked to them and listened to the medical experts talk about: What do the x rays look like for people who have been exposed to asbestos as opposed to those who have been exposed to silica?

We know people can die from both, do die from both. But as it turns out, if we establish an asbestos trust fund, and someone has been exposed maybe to asbestos but does not have the markings from asbestos, and someone has been exposed to silica, and they have the impairment that relates to silica, can they come to the trust fund and be made whole out of the asbestos trust fund? The answer is no. The silica victims are welcome to go back into the tort system, to stay in the tort system. Again, there is apparently a real difference in the appearance of the x rays of the lungs of people who have been exposed to asbestos who have asbestosis and those who have lung disease that has been caused by silica.

Those are some of the improvements that have been made to the bill. I want to

mention maybe one or two others that I think ought to be made and have been drawn to my attention, and I suspect to most of our colleagues' attention as well.

One deals with the startup provisions and the steps we need to take to help ensure the trust fund is set up and running quickly and efficiently. We are on a tight time period, a tight timeframe. There is a whole lot of work that is going to be done that we have not done, at least not with asbestos. It is going to be a real challenge to the Department of Labor getting the right people to run this operation and assembling the money quickly and putting in place a system that is user friendly and will actually provide relief to a lot of victims.

I believe there are some further steps we will debate on the floor and, hopefully, be able to adopt.

Some folks from the insurance industry have shared with me, and I am sure shared with others, the concern they have about potential leakage issues, as people file claims in the tort system for alleging impairment of breathing from exposure to asbestos. And the question is: At what point do we say to the victim, to the plaintiff, you have to go into the trust fund or you may continue through the tort system? There are concerns raised by the insurance industry that we, frankly, have not done the kind of job that needs to be done with respect to what they call leakage in the system. That is one we want to revisit and consider.

I am not an attorney. We all know people who are. I have a concern, and I know it is a concern shared by others, that if we cap it at 5 percent, the amount

of money that can go to an attorney, in some cases that is adequate. This is a system that is not designed to, frankly, need a whole lot of assistance. And, hopefully, some people will be able to go through this system and apply for money from the trust fund and receive their claim, their payment without the assistance of an attorney or anybody else.

But in some cases you are going to have an attorney who has worked for not just months but maybe a couple of years to help prepare a case to be heard in a court, only to find that before they could actually bring the case to a judge and jury and have a verdict, they are cut off because of the establishment of this trust fund. In that case, where you may have had attorneys work for months or a couple years, to say that person can only receive a 5-percent payment out of the payment from the fund, I think, is just unfair.

Again, it goes back to one of my core values I talked about earlier: treat other people the way we want to be treated. If I were the attorney and I had actually done work for a couple of years, I would want to be paid more than 5 percent of, say, a million dollars for the work I had done. Attorneys today, not uncommonly, get 25, 30, 35, 40 percent in attorney's fees for the work they do in conjunction with these victims. I am not suggesting we have those kinds of payments to attorneys, but I would suggest maybe the better part of valor is to say that the attorneys could receive 5 percent, and in cases where they have done work give the administrator of the fund the discretion to provide something in addition, something on top of, above the 5-percent cap--at the discretion of the

administrator. And maybe we want to cap it at 20 percent or something like that. But I would suggest that is a fair thing to do and a just thing to do, particularly where an attorney has done a great deal of work.

Let me close by saying this. I came here, like I think all my colleagues, because I wanted to get things done. I want to right wrongs and try to help people as best we can. Sometimes it is best for people who are hurt to take those grievances to the courts, and to address, through the judicial system, the wrongs they believe they have incurred. The highest Court in our land, the Supreme Court, has said on several occasions in the last decade, we have a problem with asbestos litigation that needs the attention of the Congress and the President and we should try to improve on a situation that is flawed.

I am an old Navy guy and spent a number of years of my life as a naval officer, and not as much time on ships. I spent a little time on ships. I know a lot of folks served in the military--and a lot of them were in the Navy who served on ships--who were exposed to asbestos, had their breathing impaired, and, in a number of cases, died.

They are not in a position to go into court and sue the Federal Government to be made whole. They can get some help through the VA system, and they have, but they are not in a position to receive the kind of payments and recovery of damages that others have been able to in the courts because private sector employers have been sued as defendants by victims, and those victims cannot sue the Federal Government. Under this legislation, a veteran from any part of the armed services who is precluded

from receiving much in the way of damages will now have the opportunity to go into the same trust fund and apply for the same dollar payments that any other person who has been injured could apply for. As a veteran, that is especially noteworthy. It goes a long way to explaining why so many veterans groups strongly support this legislation.

Again, what is our goal? Our goal is to try to make sure that when people have been exposed to asbestos for an extended period of time, when their health has been damaged, that they have an opportunity to receive some compensation for that harm, to try to do so in a way that is prompt and where the amounts of money they can receive actually vary from fairly modest, when the impairment is slight, to rather substantial when the impairment is substantial or maybe life threatening. We want to do this in a way where we put more money in the pockets of victims and their families and in a way that acknowledges the work that is done by attorneys when they have done a considerable amount of work in preparing for a case that then ends up in the trust fund.

Is this bill perfect as it comes to us today? We have been joined on the floor by the chairman of the committee. I thank him and those with whom he serves, certainly Senator Leahy. I also want to say a word about Judge Becker, former chief judge of the Third Circuit, who has worked very hard as a mediator to try to help us get to a better place with this legislation. I have met a lot of people in my life, but here is a man who suffers from very serious health problems himself. He has non-Hodgkins lymphoma and is in his early seventies.

He travels from Philadelphia on the train, pays for his own way. When he spends a night here, he stays in a hotel and pays his own way. He pays for his own meals. He does all this work because he believes it is the right thing to do--and it is.

For all who have been working on this for a lot longer than I have to get us to this point in time, we need to vote at 6 o'clock to proceed to the bill, debate it, change the parts we think need to be changed, and go forth from there.

I yield the floor.